a dogmatic adherence to the letter of the statute in those cases where the mortgagee has found it impossible to achieve both a realization on the security and a deficiency in one action. Hence, in the case of a mortgage of foreign realty, the parties being in this state, a foreclosure in the forum at the situs of the res has been held not to preclude a separate action here for a deficiency.[6] The second and separate action for a deficiency has also been allowed here against a mortgagor when he returns to this state after having been absent during foreclosure proceedings, a deficiency judgment rendered at that time being invalid for lack of *in personam* jurisdiction.[7] Why, then, in the principal case, with the mortgagor in Arizona, and the mortgage res in California, where there existed the same impossibility of achieving both a realization on the security and a deficiency in the one action, as in the previous two cases, does the court indicate that the language rather than the policy of the statute will be followed?

M. F.

TAXATION: INHERITANCE TAX ACT: RECENT CALIFORNIA CASES—The frequency and incessancy of legislation on the inheritance tax act points strikingly to the confusion that still exists in that field of the law. The whole transfer tax law is still unshaped and as yet not definitively delimited. Of late a whole cluster of cases has been presented to the courts of this state and the inheritance tax law has been subjected to re-examination and more accurate definition. Some of these cases, which it is believed either settle some doubtful questions or fill existing gaps in the law, are here briefly reviewed.

1. Transfer in Contemplation of Death.

The general theory underlying the inheritance tax law is that it imposes a tax on all transfers of which death is the generating source.[1] Originally the tax was confined to succession by will or by intestate laws.[2] But it was early discovered that if the tax was restricted to purely testate and intestate succession it invited easy evasion by means of *inter vivos* gifts and agreements. The next logical step in the enforcement of the policy of taxing transfers of title effective at the moment of death was to tax certain transfers made during life. As a result the various state inheritance tax acts now almost universally include two classes of *inter vivos*

[6] Felton v. West (1894) 102 Cal. 266, 36 Pac. 676.

[7] "It is true the personal judgment docketed against the defendant was void, and also that under the code section cited (§ 726), there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage on real or personal property. It does not follow, however, that after the mortgage security is exhausted, leaving a deficiency which is no longer secured, no new action on the note can ever be maintained." Blumberg v. Birch, supra, n. 3.

[1] Knowlton v. Moore (1900) 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747.

[2] Gleason and Otis, Inheritance Taxation (2d ed.) p. 84.

transfers imposing death duties, viz, (1) transfers intended to take effect in possession or enjoyment at or after the grantor's death; and (2) transfers made in contemplation of death.[3] The taxation in both classes of transfers is sustained upon the theory that a tax upon them prevents the evasion of the death duties, or upon the theory that they are substitutes or equivalents of death transfers and bear a fair relation to death.[4]

Since the inclusion of these transfers as imposing death duties there has been much judicial interpretation of the meaning of the term "in contemplation of death." It is clear that the term is not as restrictive as *donatio mortis causa*.[5] On the other hand, it is not that general expectation of death common to all men.[6] In this state prior to 1911 the phrase "in contemplation of death," as interpreted in the cases, seems to have been confined to those situations in which the gift was made in contemplation of impending death because the donor was actually suffering from some existing infirmity or illness.[7]

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[3] These two classes of taxable transfers were included in the parent California Inheritance Tax Act of 1893, Cal. Stats. 1893, p. 193. The "transfer in contemplation of death," in which we are here solely interested, is found in practically all the state acts, e. g. Pennsylvania, New York, Illinois, Wisconsin, Indiana, Iowa, Michigan, Georgia. Massachusetts has no such provision.

[4] Kelly v. Woolsey (1918) 177 Cal. 325, 328, 170 Pac. 837; Keeney v. New York (1912) 222 U. S. 525, 56 L. Ed. 299, 32 Sup. Ct. Rep. 105; State v. Pabst (1909) 139 Wis. 561, 121 N. W. 351. The "evasion" theory is chiefly an argument by epithet. A case is either on one side of a statutory line or on the other. See Holmes, J., in Bullen v. Wisconsin (1915) 240 U. S. 625, 630, 60 L. Ed. 830, 36 Sup. Ct. Rep. 475.

[5] All gifts *causa mortis* are in contemplation of death, but it is not true that all gifts in contemplation of death are gifts *causa mortis*. A gift *causa mortis* is revocable by the donor. Some earlier New York cases held that there was no distinction between the two. This view was held too narrow by our own court, Estate of Reynolds (1915) 169 Cal. 600, 147 Pac. 268, and is no longer entertained by the courts of New York: Matter of Dee (1913) 148 N. Y. Supp. 423, affirmed 161 App. Div. 881, 145 N. Y. Supp. 1120, affirmed without decision 210 N. Y. 625, 104 N. E. 1128.

[6] Spreckels v. State (1916) 30 Cal. App. 363, 158 Pac. 549; State v. Pabst (1909) 139 Wis. 589, 121 N. W. 351; Conway's Estate v. State (1918) 120 N. E. (Ind. App.)

[7] Under the law in force prior to 1911 but six cases arose in California on the question of gifts in contemplation of death. In two of them it was held that the transfers were taxable as made in contemplation of death: Estate of Reynolds (1915) 169 Cal. 600, 147 Pac. 268 (donor suffering from cancer, made transfer on eve of operation, died one year later); Abstract & Title Guaranty Co. v. State (1916) 173 Cal. 691, 161 Pac. 264 (donor, 80 years old, in feeble condition at time of transfer, died six months later). In the other four cases the transfer was held not taxable: Spreckels v. State (1916) 30 Cal. App. 363, 158 Pac. 549 (donor 79 years old, active, died of heart failure three weeks after transfer); McDougald v. Wulzen (1917) 34 Cal. App. 21, 166 Pac. 1033 (donor, 83 years old, in good health, died of acute pneumonia a year and half after transfer); Kelly v. Woolsey (1918) 177 Cal. 325, 170 Pac. 837 (donor, 77 years old, in usual health, died two years after transfer); Estate of Minor (1919) 180 Cal. 291, 180 Pac. 813 (ante-nuptial agreement, husband 78, active and well, died seven years afterwards). In both Spreckels v. State and McDougald v. Wulzen the

In 1911, however, the legislature added an interpretative provision to the inheritance tax act covering the phrase "in contemplation of death." [8] Now for the first time[9] a case involving the effect of that provision has been presented to the Supreme Court of California in *Estate of Pauson.*[10] In this case, the deceased transferor, when he was seventy-eight years of age and in vigorous health, made a transfer to a corporation of all his property in exchange for the stock of the corporation, which he distributed to his children. At the organization meeting of the corporation the donor was elected president and voted a salary of $20,000 per annum to cover household and personal expenses. The deceased died less than a year later from a sudden acute illness. The Supreme Court sustained a finding of the trial court that the transfer was made in contemplation of death within the meaning of the 1911 provision. A gift may now, therefore, be in "contemplation of death" though the donor was at the time neither ill nor feeble, nor looking forward to his impending death.

The court bases its opinion on the statutory interpretative provision of 1911 and on the general purpose of the act as a whole. The intent of the act is to tax "any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws."

It is clear that the 1911 provision, though apparently only interpretative, extends the law to cases not originally included, and this the court itself intimates.[11] Transfers *inter vivos* are taxable as "in contemplation of death" though not within the original meaning of that term, viz., that apprehension of death which arises from some existing infirmity or impending peril. Just where the line will now be drawn it is difficult to see. Old age alone is not a sufficient test.[12] Nor does the Act of 1911 formulate any sort of standard. In the words of the act, "contemplation of death shall be taken to include that expectancy of death which actuates the mind of a person on the execution of a will." If a young man of thirty, in good health, on the eve of his marriage, makes a

court based its decision largely on the ground that it would not disturb the findings of the trial court.

[8] Cal. Stats. 1911, p. 726, Inheritance Tax Act of 1911, § 27: "....The words 'contemplation of death', as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift causa mortis; and it is hereby declared to the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws."

[9] In Estate of Reynolds, supra, n. 7, the court declared that the 1911 provision was merely declaratory of existing law, but the statement was pure dictum, as the transfer in that case was governed by an earlier act.

[10] (June 27, 1921) 62 Cal. Dec. 25.

[11] Ibid., at p. 30.

[12] In re Dessert's Estate (1913) 154 Wis. 320, 142 N. W. 647; Matter of Mills (1916) 172 App. Div. 538, 158 N. Y. Supp. 1100, affirmed 219 N. Y. 642.

will to his prospective wife, it cannot be said that he is actuated by any expectancy of death, other than that general knowledge of all men that they must some day die. If the same young man, in lieu of making a will, deeds his home to his wife and the next day is accidentally killed, it could scarcely be contended that such a gift was taxable as made in "contemplation of death." Death is the generating source of the tax and in the case supposed the gift bears no fair relation to death. Death would not be the moving cause of such gift, for it comes altogether unexpectedly, and the gift would have been made though the donor expected to live another forty years. To attempt to force such a case within the meaning of the provision here under discussion would be to cast serious doubt on the constitutionality of the provision, as a taking of property without due process.

The provision of 1911, as interpreted by our court in the principal case, rejects a clear objective test of "contemplation of impending death" which was the California rule before 1911 and seems to be the rule established by the weight of authority,[13] for no test at all. Now each case will have to be decided solely on the facts, with no guiding rule for the court to determine whether the transfer is taxable or not. In practical effect the provision will merely limit the power of the trial court in its finding of fact and will possibly shift the burden of proof from the State on to the shoulders of the donee. But transfers *inter vivos* continue to be non-taxable unless they amount to a substitute or are an equivalent of a death transfer. And the court to justify taxation must ascertain that each transfer bears a fair relation to death.[14]

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[13] Matter of Palmer (1907) 117 App. Div. 360, 102 N. Y. Supp. 236; Matter of Price (1909) 62 N. Y. Misc. 149, 116 N. Y. Supp. 283; Rosenthal v. People (1904) 211 Ill. 306, 71 N. E. 1121; People v. Burkhalter (1910) 247 Ill. 600, 93 N. E. 379; People v. Danks (1919) 289 Ill. 542, 124 N. E. 625; State v. Pabst (1909) 139 Wis. 561, 121 N. W. 351.

[14] Such doubtful cases of non-taxability as Spreckels v. State, supra, n. 7, have provoked drastic legislation on this much-vexed problem. Some states, e. g., Colorado and Wisconsin, have adopted a suggestion of Judge McElroy, Inheritance Taxation, p. 109, and have fixed a definite time prior to death within which gifts shall be deemed "made in contemplation of death." In Wisconsin the period is six years prior to death and the wording of the statute is: "shall be *construed* to have been made in contemplation of death" (italics ours). This is possibly a substantive rule, not merely a presumption that is rebuttable, and its constitutionality is questionable. See Gleason and Otis, Inheritance Taxation (2d ed.) p. 123. The more desirable method of solving this problem would be for the legislature to adopt a rule of presumption. An act declaring that "all gifts made by a donor over seventy years of age, within six years prior to his death shall be presumed made in contemplation of death" would undoubtedly be constitutional. Such a presumption would not violate due process, for there would exist a rational relation between the fact of advanced age and the fact in issue. See Bailey v. Alabama (1911) 219 U. S. 219, 55 L. Ed. 191, 31 Sup. Ct. Rep. 145; Mobile, J. & K. C. R. Co. v. Turnispeed (1910) 219 U. S. 35, 42-44, 55 L. Ed. 78, 31 Sup. Ct. Rep. 136

2. Time When Tax Attaches: Valuation.

In *Chambers v. Lamb*[15] a husband, by deed conveying full title, made a gift in contemplation of death to his wife of property valued at $194,775. In the interval between the transfer, made in 1909, and the death of the transferor in 1911 the value of the property enhanced to $212,775. The court held that the tax is to be measured by the valuation of the property at the date of the transfer and not at the death of the transferor.

The decision seems clearly correct on principle.[16] It has been repeatedly held in this state that the law in force at the time of a conveyance in contemplation of death governs and not that in force at decedent's death.[17] The transfer of title is the thing taxed. As stated in the principal case, "It is the vesting in interest of the rights passing between the parties which constitutes the transfer taxed by the act . . . The death of the transferor adds nothing to the transfer if full rights have passed to the grantee prior to that time." [18]

The existing confusion in the language of many of the decisions is attributable to a failure to distinguish taxable transfers *inter vivos* and transfers occurring at death. The true test of value by which the tax is to be measured is the value of the estate at the time of the transfer of title.[19] If the title passes at the instant of death through testacy or intestacy, the tax attaches at that time, and the rate of taxation and time of valuing the property are determined as of the date of death. If, on the other hand, the transfer occurs during life, the tax attaches at the moment full rights pass to the grantee and the transfer is completed.

Nor is it material that the tax is not payable until the death of the transferor.[20] The legislative rule that the payment of the tax is postponed and does not become due and payable until after the death of the transferor is merely a rule of convenience.[21]

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[15] (June 17, 1921) 61 Cal. Dec. 817, 199 Pac. 33.

[16] There are few decisions directly in point. The leading and practically only case, Matter of Hodges (1915) 215 N. Y. 447, 109 N. E. 559, accords with the principal case.

[17] Hunt v. Wicht (1917) 174 Cal. 205, 162 Pac. 639; Estate of Felton (1917) 176 Cal. 663, 169 Pac. 392; Estate of Gurnsey (1918) 177 Cal. 211, 170 Pac. 402; Nickel v. State (1918) 179 Cal. 126, 175 Pac. 641; Estate of Brix (1919) 181 Cal. 667, 186 Pac. 135; Estate of Murphy (1920) 59 Cal. Dec. 517, 190 Pac. 46; Estate of Miller (1920) 61 Cal. Dec. 19, 195 Pac. 413.

[18] 61 Cal. Dec. 817 at 818.

[19] Matter of Davis (1896) 149 N. Y. 539, 546, 44 N. E. 185; Matter of Sloane (1897) 154 N. Y. 109, 113, 47 N. E. 978.

[20] Estate of Miller, supra, n. 17. As stated in the principal case, 61 Cal. Dec. at 819, "The imposition of a tax and its maturity are commonly regarded as distinct and separate stages in the process of taxation." The tax attaches at the moment of transfer, but accrues, in the sense of being due and payable, only at death, and the incident of collection does not affect the liability.

[21] "As such gifts seldom become known to the taxing authorities until after the death of the person making them, there is usually no effort to tax

Logically, it would seem that a tax which may attach several years before its maturity would carry interest. Here, however, as a matter of legislative grace, no interest is levied until eighteen months after the tax has matured,[22] in the sense of being due and payable. Under the rule of the principal case, in the converse situation where there is a depreciation in the value of the property between the date of transfer and the death of the transferor, it would naturally seem to follow that the state would be entitled to collect a tax on the larger valuation.

Chambers v. Gibb [23] is another case bearing on the question of the time when the tax attaches. In that case a husband made a transfer of community property to his wife in 1913. He died in 1919. Under the Act of 1913, in effect at the time of the transfer, the wife's share of the community was taxable. It was held that the wife was not entitled to the exemption of one-half of the community property, granted for the first time in 1917.[24] The case brings out in striking fashion the fact that the tax upon a transfer is fully and finally fixed by the law then in force, the instant the transfer is made, even though that law is repealed before the grantor's death.

3. Adding Several Transfers Together and Taxing As One.

The rule laid down in Chambers v. Lamb casts doubt upon *Estate of Potter*,[25] an earlier decision of our Supreme Court. In this case a mother in 1908 by a completed transfer *inter vivos* conveyed property of the value of $850,300 to her son. This transfer was taxable under the Act of 1905. By her will, effective at her death eight years later in 1916, she bequeathed additional property of the value of $146,773.57 to the same son. At the time of the second transfer the Act of 1913 was in effect. Neither the Act of 1905 nor the Act of 1913 expressly authorized the addition of the two transfers in the computing of the tax.[26] It was nevertheless held that the two transfers should be considered together and that in ascertaining the rate of tax on the bequest, the value of the prior taxable gift *inter vivos* should be taken into account.[27]

them earlier; but this fact does not affect their liability to earlier taxation if ascertained." Matter of Hodges, supra, n. 16.

[22] Inheritance Tax Act, 1917, § 7(1), Cal. Stats. 1917, p. 886.

[23] (June 16, 1921) 61 Cal. Dec. 790, 198 Pac. 1032.

[24] Inheritance Tax Act, 1917, § 1 (2), Cal. Stats. 1917, p. 881.

[25] (Feb. 25, 1921) 61 Cal. Dec. 273. Decided by a divided court. Rehearing granted March 24, 1921, now pending.

[26] The Act of 1917 enacted the first express provision for the addition of several transfers between the same donor and donee in computing the tax. Inheritance Tax Act of 1917, § 2 (9), Cal. Stats. 1917, p. 883. As to whether the clause "made either before or after the passage of this act" should be construed to apply prospectively only, viz., only to transfers after 1917 between the same donor and donee, see infra, n. 28.

[27] The practical effect of the decision was to lift the legacy out of the one, two, four and seven per cent tax classes into the twelve per cent class. By adding the transfers together the tax levied on the legacy amounted to $17,612.83 owing to the ascending tax scale; if taxed separately the tax would have been only $5,924.14.

This view the court arrived at by a process of construction of section two[28] of the Act of 1913 read in conjunction with section 16[29] of the same act, both of which are decidedly ambiguous on the point.

The gift and legacy in Estate of Potter were distinct in character and separate in time, and it would seem that unless some legislative provision commands otherwise, they should not have been lumped together and taxed as one transfer.[30] It is clear by the decisions of this state that the legislature cannot impose increased rates upon past completed transfers. The gift of 1908 vested full rights in the donee at the time of the gift. Death added nothing to his rights. At the instant of transfer the tax attached, the rate of taxation was fixed,[31] the time for valuing the property determined,[32] and the provisions of the law then in force became generally controlling.[33] Subsequently to increase the rate of taxation would be a taking away from the donee of that which is already vested in him,[34] and would be a violation of due process. This the court recognizes and rests its decision on the grounds that though the legislature is powerless to impose increased taxation on a past gift it may nevertheless make such prior gift the occasion for swelling the rate of taxation on any property passing at death. That such a power exists in the legislature is indisputable. But the sole question in this case is to ascertain by construction whether the legislature had at that time exercised the power. In the interpretation of tax statutes every intendment is in favor of the taxpayer,

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[28] The Inheritance Tax Act of 1913, § 2 (Cal. Stats. 1913, p. 1066), provides for a tax upon all transfers "whether made before or after the passage of this Act." In Hunt v. Wicht, infra, n. 34, it was held that this clause, if designed to tax past transfers, was unconstitutional. In New York the same clause has been construed as referring only to transfers which do not become effective until after the tax act goes into operation. Matter of Seaman (1895) 147 N. Y. 69, 41 N. E. 401; Matter of Pell's Estate (1902) 171 N. Y. 48, 63 N. E. 789. Transfer taxes are prospective in character. Chambers v. Gibb (1921) 61 Cal. Dec. 790, 198 Pac. 1032. The *ratio decidendi* in the principal case would seem to be that, since the legislature was constitutionally powerless to increase rates on past transfers, it intended to do the next best thing, viz., increase the rate on future transfers by taking past gifts into consideration.

[29] The Inheritance Tax Act of 1913, § 16 (Cal. Stats. 1913, p. 1077), authorizes the probate court, through the appraiser, to fix the tax "upon any property passing in said probate proceedings" and also upon any other property passing by prior *inter vivos* transfers if the donee also acquired property by virtue of said probate proceedings. This is merely for the convenience of collection and it is difficult to see how it authorized the addition of the transfers to be taxed as one transfer, as construed by the court.

[30] What cases there are in point, though few, are against the addition of the two transfers. Matter of Hodges (1915) 215 N. Y. 447, 109 N. E. 559; Matter of Garcia (1918) 183 App. Div. 712, N. Y. Supp. 980, and cases there cited.

[31] Estate of Felton (1917) 176 Cal. 663, 169 Pac. 392.

[32] Chambers v. Lamb (1921) 61 Cal. Dec. 817, 199 Pac. 33.

[33] Chambers v. Gibb (1921) 61 Cal. Dec. 790, 198 Pac. 1032.

[34] Hunt v. Wicht (1917) 174 Cal. 205, 162 Pac. 639, L. R. A. 1917C 761.

and no provision should be extended by implication.[35] The enactment in 1917 of an express provision requiring the addition of several transfers in computing the tax is of itself strong indication of the fact that the legislature had merely overlooked this situation.[36] As pointed out in the dissenting opinion, the result reached in the majority opinion was arrived at only by indulging in a long course of more or less abstruse argument. The simpler way would have been to regard the gift, taxable only under the prior act, and the legacy, taxable only under the later act, as separate entities, each to be taxed at the rates fixed by the law applicable thereto, without regard to the other.

4. Deduction of Other Inheritance Taxes.

In the *Estate of Miller*[37] it was held that in computing the amount of the local state inheritance tax both the federal tax and the inheritance tax imposed by Nevada should be deducted. The result reached was based entirely on judicial construction. The decision arose under the Inheritance Tax Act of 1911, which is silent as to such deductions, and provides only that the tax is to be computed on the "clear market value" of the "beneficial interest."[38]

The decisions of the various courts under state statutes with no specific provision as to deduction of other inheritance taxes are in conflict.

In the matter of the federal tax New York[39] and Wisconsin[40] do not allow deductions. By the majority view, however, the federal tax is allowed as a deduction.[41] The majority view is usually rested on the grounds that the state statute taxes only the right of the beneficiaries to receive and it therefore excludes the

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[35] Merced Co. v. Helm (1894) 102 Cal. 159, 36 Pac. 399; Connelly v. San Francisco (1912) 164 Cal. 101, 127 Pac. 834.

[36] See U. S. v. Field (1921) — U. S. —, 65 L. Ed. —, 41 Sup. Ct. Rep. 256, in which it was held that an express provision in a later act taxing a transfer indicated doubt as to taxability under a prior act.

[37] (Dec. 27, 1920) 61 Cal. Dec. 19, 195 Pac. 413.

[38] By previous construction this was interpreted as meaning "net clear value," and debts and expenses of administration were allowed as deductions. Estate of Kennedy (1910) 157 Cal. 517, 108 Pac. 280, 29 L. R. A. (N. S.) 428; Estate of Hite (1911) 159 Cal. 392, 113 Pac. 1072, Ann. Cas. 1912-C 1014, 32 L. R. A. (N. S.) 1167.

[39] In re Bierstadt's Estate (1917) 178 App. Div. 836, 166 N. Y. Supp. 168; In re Sherman's Estate (1917) 179 App. Div. 497, 166 N. Y. 19, affirmed, 222 N. Y. 540, 118 N. E. 1078: These decisions followed Matter of Gihon (1902) 169 N. Y. 443, 62 N. E. 561, which involved a state succession tax and a federal succession tax under the War Revenue Act of 1898, which was wholly different from the Estate Tax of 1916 which is not a tax on the succession. In Massachusetts an opposite conclusion had been reached on the Act of 1898. Hooper v. Shaw (1900) 176 Mass. 190, 57 N. E. 361.

[40] In re Week's Estate (1919) 169 Wis. 316, 172 N. W. 732.

[41] State v. Bemis (Colo. 1920) 189 Pac. 32; Corbin v. Baldwin (1917) 92 Conn. 99, 101 Atl. 834; Corbin v. Townsend (1918) 92 Conn. 501, 103 Atl. 647; People v. Pasfield (1918) 284 Ill. 450, 120 N. E. 286; State v. Calumet Bank (Ind. 1919) 125 N. E. 200; State v. Probate Court (1918) 139 Minn. 210, 166 N. W. 125; In re Roebling's Estate (N. J. 1919) 104 Atl. 295; In re Knight's Estate (1918) 261 Pa. St. 537, 104 Atl. 765.

amount of the federal tax which cannot pass to them.[42] The federal tax is levied upon the estate as an entity, i. e., upon what is left by the decedent. The state inheritance tax, on the other hand, is a tax on the privilege of succession and is levied upon what comes to each beneficiary, after distribution. This reasoning is adopted by the court in the principal case, and although it undoubtedly accords with the weight of authority and reaches a desirable result it is at least open to question. Pursued logically it would also require the deduction of the local state tax.[43]

Even greater conflict exists as to the deduction of inheritance taxes of other states.[44] Thus, it will be noted, the federal tax is deducted in Illinois[45] and Colorado[46] but no deduction is allowed in those states for taxes of other states. Those courts allowing the deduction have proceeded on the ground that the tax of the foreign state must be paid before the executor can reduce the property to possession.[47] The California court rejects this reasoning and rests its decision on the grounds that the authority of the state having actual control over the subject-matter is superior.[48] While the result reached seems desirable, the reasoning is not entirely convincing.[49]

It is apparent that the confusion in the decisions arises from statutory construction of an ambiguous statute. The courts in their desire to evade the rigors and inequalities of double taxation have been put to it in striving to reach that end. The question should be solely one of state policy, calling for a definite, clear statutory provision. It is not a question of jurisdiction.[50]

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[42] Corbin v. Townsend, supra, n. 41.

[43] The more desirable rule would probably be for the states to allow deductions of the federal tax, and Congress the deduction of the various state taxes. But Congress has refused to return the courtesy. The Revenue Act of 1918 explicitly forbids the deduction of the various state taxes. The California Act between 1917 and 1921 forbade the deduction of the federal tax. See Inheritance Tax Act, 1917, § 2 (10) repealed in 1921; see infra, n. 51.

[44] No deduction: Matter of Penfold (1915) 216 N. Y. 171, 110 N. E. 499; People v. Palmer's Estate (1914) 25 Colo. App. 450, 139 Pac. 554; People v. Ballans (Ill. 1920), 128 N. E. 542. Deduction allowed: Corbin v. Townsend, supra, n. 5; In re Van Biel's Estate (1917) 257 Pa. St. 155, 101 Atl. 316; Bullard v. Redwood Library (1914) 37 R. I. 107, 97 Atl. 30.

[45] State v. Pasfield, supra, n. 41.

[46] State v. Bemis, supra, n. 41.

[47] Corbin v. Townsend, supra, n. 41.

[48] See Nickel v. Cole (April 25, 1921) —— U. S. ——, 41 Sup. Ct. Rep. 467, in which the Nevada tax in this case was sustained on appeal to the U. S. Supreme Court.

[49] Even conceding that the authority of the state of *situs* is superior, it must be borne in mind that the tax is not a tax on property but upon the privilege of taking it. The laying of an excise by Nevada upon the privilege of taking the property does not diminish the value of the property that passes. It merely increases the taxes the beneficiaries have to pay for the privilege of succeeeding to the property that passes to them. People v. Palmer's Estate, People v. Ballans, supra, n. 44.

[50] Blackstone v. Miller (1903) 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. Rep. 277.

Since the decision in the Miller case, our legislature has acted and we now have a clear statutory provision requiring deductions of both federal and state taxes.[51] While that provision is merely declaratory of the Miller case, it is more desirable to have it resting on an express legislative pronouncement than on judicial legislation.

T. W. D.

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[51] Inheritance Tax Act § 2, Cal. Stats. 1921. (Senate Bill No. 175), Chap. 821. (10): "In determining the market value of the property transferred, the following deductions and no others shall be made from the appraised value thereof: .....

(e) The amount due or paid the government of the United States as a federal inheritance or estate tax....

(f) The amount due or paid any state or states of the United States (excepting California) as a state inheritance, succession or transfer tax...."

Book Reviews

A TREATISE ON THE FEDERAL ESTATE TAX. By Raymond D. Thurber. Matthew Bender & Company, Albany, N. Y., 1921, pp. xvi, 423.

This book is a pioneer in its field. There are several standard works on the inheritance taxes imposed by the various states, but as yet the Federal Estate Tax is too little known, either in theory or practise, to have received any definite and comprehensive formulation.

The Federal government has on previous occasions resorted to death duties as a source of revenue. Such taxes were imposed during the Revolutionary War, the Civil War, and the Spanish War. These were all regarded as temporary war emergency measures and were repealed as soon as the pressure of war was removed. The present Federal Estate Tax, first introduced in 1916 (amended twice in 1917 and re-enacted in 1918) also had its origin in a war emergency, being necessitated by the failing revenue owing to the World War. But the prospect is that it will outlive the immediate emergency. Furthermore, it is not, like previous Federal taxes, a legacy tax. It is, as the Act explicitly declares, an estate tax levied on the entire estate of the decedent without reference to the beneficiaries or their respective shares. Because the continued existence of this tax is practically insured and also because of its fundamental difference in theory from other death duties, the subject of this book is of great interest to the profession.

However, in compiling this book the author labored under the serious disadvantage of lack of authoritative material. At the time of its going to press, no case directly bearing on the Act had been decided by the U. S. Supreme Court. N. Y. Trust Co. v. Eisner, — U. S. —, 41 Sup. Ct. Rep. 506, which holds that the tax is not an interference with the state's powers, nor a direct tax,